BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK NOE	)	
Claimant	)	
VS.	)	
	)	Docket No. 270,808
G & W FOODS	)	
Respondent	)	
AND	)	
	)	
BENCHMARK INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the preliminary hearing Order of Administrative Law Judge Jon L. Frobish dated February 14, 2002. The Administrative Law Judge found claimant had failed to provide timely notice of accident and had failed to submit timely written claim. While whether claimant suffered accidental injury arising out of and in the course of employment was also at issue, the Administrative Law Judge does not specifically address that issue. He simply states that if claimant did have an accident, then it happened in November of 2000. That is the date on which he bases the lack of notice and lack of written claim.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?

(2) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520?

(3) Did claimant submit timely written claim of accident pursuant to K.S.A. 44-520a?

(4) Did respondent file an accident report and, if so, on what date?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant, a meat cutter for respondent, began working on March 13, 2000. Clamant's initial duties required that he unload trucks, including boxes of product weighing anywhere from 20 to a little over 80 pounds. Respondent's representatives were aware that claimant had back problems.

Claimant alleges that on or about November 13, 2000, while lifting a box of meat off of a pallet, he suffered a sudden onset of low back pain. Claimant testified he told William Knapp, the meat market manager, of the accident, but that Mr. Knapp ignored his complaints. Claimant did not seek medical treatment at that time. The first medical treatment claimant sought was on July 31, 2001, approximately eight and a half months after the alleged date of accident.

No less than ten witnesses testified in this matter, some more than once, all before the Administrative Law Judge.

Terry Mitchell, respondent's store manager, acknowledged claimant advised him of ongoing back problems in November of 2000. However, claimant did not advise that the back problems were, in any way, related to his work and claimant at no time requested medical treatment for those back symptoms.

Because claimant did have a history of back injury and was experiencing occasional symptoms, Mr. Mitchell instructed Mr. Knapp to use the younger personnel to unload the trucks and relieve claimant of any ongoing lifting responsibilities.

Ferdinand Jay Vananne, who is the produce department manager, knew claimant and was aware of his ongoing back problems. Mr. Vananne testified that he never saw claimant unload any trucks because claimant indicated he was too fearful of suffering injury. Mr. Vananne was never made aware that claimant alleged a back injury while at work. Mr. Vananne, however, as the produce manager, was not responsible for claimant. Mr. Knapp, the meat market manager, was claimant's immediate supervisor. He acknowledged claimant was a hard worker, although claimant did miss work and had an ongoing alcohol problem. Several witnesses testified that claimant would, at times, be at work with alcohol on his breath. However, no one testified that claimant was ever inebriated at work or was ever caught drinking during work hours.

Mr. Knapp became aware of claimant's prior back problems within approximately a week of claimant's beginning work with respondent. He testified that claimant would not help unload trucks or pallets because of fear of additional injury. Claimant never advised Mr. Knapp of an injury by accident on or around November 13, 2000. The first time he was advised that claimant was claiming ongoing back pain from his work with respondent was in the spring of 2001. He was aware claimant went to the doctor in July for MRI tests.

Virgil Gough, a meat cutter, also testified. He stated that claimant did not unload trucks or remove boxes off of pallets because of his ongoing back problems. He was never advised that claimant had ongoing back problems until July 2001. Mr. Gough did occasionally notice alcohol on claimant's breath at work. But claimant at not time was impeded in his ability to do his job, in Mr. Gough's opinion.

John Call, the assistant manager, observed claimant on a regular basis. Claimant filed a workers' compensation claim with Mr. Call dated October 1, 2001. Mr. Call testified that claimant rarely moved boxes because they had high school kids at the store to do the heavy lifting. Claimant's bad back was apparently known to everyone in the store.

Claimant deposed Sharon Edwards, respondent's deli manager. Ms. Edwards stated that she saw claimant unloading trucks on a regular basis and that claimant occasionally helped her with her lifting. She stated claimant never complained about any back problems. Ms. Edwards also denied ever smelling alcohol on claimant's breath. Mr. Knapp testified that Ms. Edwards quit on or about December 28, 2001, after having disagreements with respondent's employees. The nature of those disagreements was never discussed in the record.

Also testifying was Leslie Norman, claimant's live-in girlfriend. Ms. Norman stated that claimant came home sometime in November 2000, talking about his back and the fact that he had injured it lifting at work. She acknowledged that claimant had advised her that high school kids were helping do the lifting, but claimant went on to say that he was still doing his job. Claimant experienced new problems in July of 2001, when she had to take him to the doctor. Additionally, in November 2001, claimant experienced a seizure and was taken to the hospital. The medical records identified by Ms. Edwards indicated claimant had had two prior seizures, although the medical reports regarding those incidents are scant.

Claimant testified to having to lift boxes weighing in excess of 80 pounds on a regular basis. He also advised that he had a sudden onset of pain while moving those boxes on November 13, 2000, but was unable to explain his failure to obtain medical treatment until July 31, 2001. At that time, claimant was told not to return to work until his back was fixed. Claimant acknowledged having neurological problems, including seizures and muscle twitching. Claimant, however, denied having prior back problems. When asked about muscle spasms experienced in 1978, claimant advised those were only

temporary. Claimant did acknowledge that in April 2001, he had an incident where, after he got out of bed, his hip and leg locked up. Claimant sought no medical treatment for this incident.

In November of 2001, claimant was admitted to the University of Kansas Hospital, undergoing alcohol withdrawal treatments. Claimant testified earlier to drinking five to six beers a day. However, the medical evidence contained in the record indicated claimant's beer consumption was twelve to twenty-four beers a day, with more on weekends.

K.S.A. 44-501(a) states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The burden of proof must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The testimony in this record is, at times, directly contradictory. There are witnesses for respondent who testified claimant at no time alleged any accidental injury and continued performing his job for eight months after the alleged onset of November 13, 2000.

Claimant, on the other hand, testified of ongoing symptoms and a worsening of his condition over a period of several months. Claimant's position is supported by his live-in girlfriend, Leslie Norman. However, no respondent employee testified that claimant injured himself on the job or advised of any work-related injury at any time prior to July 2001. There were numerous witnesses who testified that claimant had a preexisting ongoing back problem and that his lifting was limited as a result.

In workers' compensation litigation, the administrative law judge has the opportunity to observe witnesses testify in person. In this highly unusual situation, ten witnesses testified, some more than once, all before the Administrative Law Judge. In reaching his decision, the Administrative Law Judge described the testimony against claimant's position as "overwhelming."

The Board adopts the Administrative Law Judge's findings that claimant did not carry his burden of proof in this instance. The Administrative Law Judge stated that if claimant had an accident, it would have occurred in November of 2000. The Board finds, for purposes of preliminary hearing, claimant has failed to prove that he suffered accidental injury on November 13, 2000, and further failed to prove that he suffered an ongoing series of injuries through his last day of work of August 3, 2001.

K.S.A. 44-520 obligates that an employee provide notice of accident to the employer within 10 days of the accident, stating the time, place and particulars of the accident. The statute goes on to state that the 10-day notice provided shall not bar a proceeding for compensation if the claimant shows that the failure to provide timely notice was due to just cause. Under those circumstances, the applicable time limit for providing notice is extended to 75 days after the date of accident. Claimant testified that he told Mr. Knapp of his injury on or about November 13, 2000. Mr. Knapp, who testified on two occasions, denies this. Additionally, claimant failed to seek any medical treatment for eight and a half months after the accident and, as near as can be determined from the record, continued performing his regular meat cutter duties for respondent. The Board finds claimant has failed to prove that he provided timely notice of accident as required by K.S.A. 44-520. Therefore, the finding by the Administrative Law Judge on this issue is affirmed.

Finally, the Board must consider whether claimant satisfied the requirements of K.S.A. 44-520a, which obligates that a claimant provide written claim and that same be served upon the employer within 200 days after the date of accident or within 200 days of the suspension or last payment of compensation.

As claimant's written claim was not filed until the demand letter of October 5, 2001, this would be substantially outside the 200-day limit contained in K.S.A. 44-520a.

K.S.A. 44-557 obligates an employer to make or cause to be made a report of accident to the Director within 28 days after receiving knowledge of personal injury by accident. The statute's caveat, however, qualifies the requirement that injuries sustained by such accident "are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained."

As noted above, claimant missed no work after November 13, 2000, thereby, negating respondent's obligation to file an accident report. Additionally, there was no

credible evidence in the record that claimant provided respondent with "knowledge" of an accident which would have obligated respondent to file the accident report. The Board, therefore, finds that claimant has also failed to prove that he submitted timely written claim pursuant to K.S.A. 44-520a.

The Board, therefore, finds that the Order of the Administrative Law Judge denying claimant benefits for the above stated reasons should be, and is hereby, affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated February 14, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

c: Jerald R. Long, Attorney for Claimant
Victor B. Finkelstein, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director